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Supreme Court, U.S.
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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

PAUL E. NUNU and SHANDA NUNU,
Petitioners

v.

THE DEL LAGO ESTATES PROPERTY OWNERS ASSOCIATION,
Respondent

Petition for Writ of Certiorari to
the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI
APPENDICES 1 & 2

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ATTORNEYS FOR PETITIONERS

31 pp

QUESTIONS PRESENTED

(1) Are findings of fact made by a Bankruptcy Court in a Judgment and Memorandum concluding a contested 11 U.S.C. §362(d) Motion to Lift Stay proceeding final for Res Judicata and Collateral Estoppel purposes after the expiration of time for appeal under Bankruptcy Rule 8002(a), or, are they *"preliminary"* and subject to being *"revised"* in a subsequent proceeding between the same parties?

(2) If such findings of fact are contained in a judgment which is final, does a subsequent judgment in a separate proceeding in the same court, involving the same parties, holding contrary to such original findings and thereby denying Petitioners their residential homestead exemption, violate the Res Judicata and Collateral Estoppel rights of Petitioners.

(3) Did the Court of Appeals and the District Court err in allowing a "judicial lien" to encumber Petitioners' residential homestead in violation of 11 U.S.C. 522(f)1?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.[1]

Petitioners:	Paul E. Nunu Shanda Nunu
Attorney For Petitioners:	L. T. "Butch" Bradt
Respondent:	The Del Lago Estates Property Owners Association [2]
Attorneys For Respondent:	Boris A. Hidalgo, Esq. Diana M. Woodman Brown, Parker & Leahy, L.L.P.

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[1] David J. Askanase, Debtors' Chapter 7 Trustee abandoned his interest in the Del Lago property by written instrument dated October 26, 2000.

[2] The Del Lago Estates subdivision is composed of 90 lots in Montgomery County, Texas, the ownership of which changes fequently, and the current identities of such owners is unknown to Petitioners. However, only the Association is a party to this litigation.

ABBREVIATIONS USED IN THIS PETITION

Paul E. Nunu	("Paul""Debtor" Or "Petitioner")
Shanda Nunu	("Shanda" Or "Petitioner")
The Del Lago Estates Property Owners Association	("POA" Or "Respondent")

INDEX TO APPENDICES

Appendix 1	Bankruptcy Court's § 362 Memorandum Opinion with separate Judgment dated July 8, 1999 entered in original bankruptcy cause
Appendix 2	Fifth Circuit Court of Appeals Memorandum Opinion dated April 23, 2001;
	Order of Fifth Circuit Court of Appeals Denying Motion For Rehearing dated May 21, 2001;
Appendix 3	District Court Memorandum and Order dated October 2, 2000 Denying Motion For Rehearing.
Appendix 4	District Court Memorandum Opinion with related Final Judgment dated August 31, 2000.
Appendix 5	Bankruptcy Court Order dated April 28, 2000 Denying Motion For Rehearing in adversary proceeding.
Appendix 6	Bankruptcy Court Memorandum Opinion and related Judgment dated March 31, 2000.
Appendix 7	Designation of Homestead filed July 14, 1988;
	State Court --Consent Judgment Of July 23, 1990;
	State Court --Order Of Contempt Dated August 14, 1995;
	State Court--Order Of Commitment Dated October 30, 1995;
	State Court-- Order Of Commitment Dated October 30, 1995;
	State Court-- Order Discharging Contempt Dated March 10, 1998;
	State Court --Final Judgment Of September 30, 1999.
Appendix 8	Various Constitutional And Statutory Provisions Involved

TABLE OF CONTENTS

Questions Presented i

List of Parties ii

Abbreviations Used in This Petition iii

Index to Appendices iv

Table of Contents v

Table of Authorities Cited vi

Reports of Opinions 2

Jurisdiction 2

Statutes Involved 2

Statement of the Case 2

Reasons for Granting the Writ 3

Summary of the Argument 4

Motion to Lift Stay 4

Enforcement of State Judgment 5

Res Judicata/Collateral Estoppel Controls 5

Construction of Judgments 8

The Property Qualifies as Homestead 9

No Valid Lien on Property 10

Conclusion 12

TABLE OF AUTHORITIES CITED

CASES

Ashe v. Swinson,
397 U.S. 436 (1970) 4, 5, 7

Behrens v. Behrens,
186 S.W.2d 697 (Tex. Civ. App. – Austin 1945, no writ) 11

Bradley v. Pacific Southwest Bank, FSB,
960 F.2d 502, 507 (5th Cir. 1992) 9

Budinich v. Becton Dickerson,
486 U.S. 196 (1988) 5, 12

Coury v. Prot,
85 F.3d 244,254 (5th Cir. 1996) 10

England v. Federal Deposit Insurance Corporation,
975 F.2d 1168, 1173(fn9) (5th Cir. 1992) 10

Farrey v. Sanderfoot,
500 U.S. 291 (1991) 11

In Re Christopher,
35 F.3d 232 (5th Cir. 1994) 6

In Re Claflin,
761 F.2d 1088, (5th Cir. 1985) 10

In Re Daves,
770 F.2d 1363 (5th Cir. 1985) 11

In Re Dibert,
117 F.3d 160 (5th Cir. 1997) 6

In Re Kennard,
970 F.2d 1455 (5th Cir. 1992) 10

In Re Macias,
168 F.3d 209, at 211(5th Cir. 1999) 6

In Re Moody,
41 F.3d 1024,(5th Cir. 1995) 6

In Re Niland,
825 F.2d 801, 815 (5th Cir. 1987) 9, 10

In Re Stangel,
219 F.3d 498, 500 (5th Cir. 2000) 6

In Re Henderson,
18F.3d 1305 (5th Cir. 1994) 10

Lines v. Frederick,
400 U.S. 18 (1970) 11

Myers v. International Trust Co.,
263 U.S. 64 (1923) 4, 8

Sea-Land Services, Inc. v. Gaudet,
414 U.S. 573, 578-579 (1984) 8

United States v. Moser.
266 U.S. 236, 241 (1924) 8

UNITED STATES CONSTITUTION

Amendment V, United States Constitution 2, 3, 5, 12

STATUTES AND RULES

11 U.S.C. § 101(36) 2, 11

11 U.S.C. § 362(d) ..... passim

11 U.S.C. § 522(f)(1) 2, 3, 10, 11

28 U.S.C. § 1254(1) 2

F.R.C.P. 1 6

Fed. R. Bankr. P. 8002(a) ..... passim

Federal R. Bankr. P. 9014 5

Federal R. Bankr. P. 9021 ..... 2, 5

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2001

PAUL E. NUNU and SHANDA NUNU,
Petitioners,

v.

THE DEL LAGO PROPERTY OWNERS ASSOCIATION,
Respondent.

Petition for Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI
APPENDICES 1 & 2

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES, AND TO THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioners, Paul E. Nunu and Shanda Nunu respectfully pray that a Writ Of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit affirming the District and Bankruptcy Court's denial of Petitioners' residential homestead exemption in a Chapter 7 proceeding.

REPORTS OF OPINIONS

The opinion of the United States Court of Appeals for the Fifth Circuit is unpublished, and appears at Appendix 2. The Order denying rehearing also appears at Appendix 2. The opinion of the United States District Court is unpublished and appears at Appendix 4. The order of the United States District Court denying rehearing appears at Appendix 3. The Memorandum opinion of the Bankruptcy Court is unpublished and appears at Appendix 6. The order of the Bankruptcy Court denying rehearing appears at Appendix 5.

JURISDICTION

The date on which the United States Court of Appeals for the Fifth Circuit decided this case was April 23, 2001. A timely filed petition for rehearing en banc was denied on May 21, 2001 (Appendix 2).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The following statutes are directly involved in this Petition: 11 U.S.C. § 101(36); 11 U.S.C. § 362(d); 11 U.S.C. § 522(f)(1); Fed. R. Bankr. P. 8002(a); Fed. R. Bankr. P. 9021 and Amendment V, United States Constitution. (Appendix 8)

STATEMENT OF THE CASE

This is an appeal from a final judgment in an adversary proceeding ancillary to a Chapter 7 bankruptcy proceeding. The adversary proceeding followed a contested 11 U.S.C. §362(d) Motion to Lift Stay proceeding between the same parties. In the adversary proceeding the Bankruptcy Court revised its original finding made in the §362 proceeding that Petitioners were ***"living there"*** to mean ***"living on weekends and fishing trips"***, after the 10-day period for appeal under Bankruptcy Rule 8002(a) had expired. This revision became the basis used to deny Petitioners their homestead exemption. Petitioners appeal the denial of their residential homestead exemption and denial of their motion to avoid Respondent's judicial liens under 11 U.S.C. § 522(f)(1).

At issue is whether a non-appealed § 362 Memorandum and Judgment concluding a contested hearing is a final judgment entitled to full res judicata and collateral estoppel effect in subsequent litigation between the same parties, or whether the findings of fact and conclusions of law contained in the §362 Memorandum are ***"preliminary"*** and subject to being revised in subsequent litigation between the same parties. By allowing the § 362 Memorandum's findings of fact and conclusions of law to be considered ***"preliminary"*** and ***"revised"***, the Courts below violated Petitioners' Res Judicata/Collateral Estoppel rights under the Fifth Amendment, and impermissibly denied Petitioners their state constitutional right to a residential homestead exemption. This denial adversely impacted Debtor's right to discharge Respondent's judicial liens under 11 U.S.C. § 522(f)(1).

REASONS FOR GRANTING THE WRIT

This case presents important questions of Federal Bankruptcy law and the finality of Bankruptcy Court judgments not previously reviewed by this Court. It also involves important Fifth Amendment questions relating to res judicata and collateral estoppel. The decisions of the Bankruptcy Court, the District Court and the Court of Appeals impermissibly converted a final judgment into an interlocutory order, in direct contravention of Fed. R. Bankr. P. 8002(a) and prior decisions of the Fifth Circuit. These decisions implicate not only the proper application of the Bankruptcy Rules, but the overall administration of the Bankruptcy Act, and specifically the res judicata and collateral estoppel rights of Petitioners. The decision of the Court of Appeals denies Petitioners the constitutional right to a residential homestead exemption, a right expressly granted under the Texas Constitution and recognized by this Honorable Court. [3]

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[3] Petitioners homestead interest is a "property" interest recognized by this Court in *United States v. Rodgers*, 461 U.S. 677, 688 (1983): "Under Texas Homestead laws, a spouse has a vested estate in the land of which she cannot be divested during her life except by abandonment or voluntary conveyance in the manner prescribed by law."

SUMMARY OF THE ARGUMENT

The judgment of the Bankruptcy Court in the contested §362 Motion to Lift Stay proceeding, was a judgment governed by Fed. R. Bankr. P. 8002(a), and if not appealed within ten (10) days, its findings of fact and conclusions of law became final, subject to the principles of res judicata and collateral estoppel, as between the same parties. As a matter of law those findings were not subject to being revised in subsequent litigation between the same parties and, as revised, used to deny Petitioners their homestead rights.

The Court of Appeal's failure to apply the findings of fact contained in the contested §362 Memorandum and Judgment directly conflicts with *Myers v. International Trust Co.,* 263 U.S. 64 (1923) and *Ashe v. Swinson*, 397 U.S. 436 (1970). As a matter of federal law and judicial economy, the principles of res judicata and collateral estoppel should apply to the findings of fact contained in the contested §362 Memorandum and Judgment and those findings should be given full force and effect between the same parties.

MOTION TO LIFT STAY

Respondent filed a § 362(d) Motion to Lift Stay so that it could proceed against Petitioners' property in State Court. After a contested hearing in the § 362 proceeding, the Bankruptcy Court entered its § 362 Memorandum and Judgment on July 8, 1999, (Appendix 1) finding: ***"On September 10, 1986, approximately 13 years prior to the commencement of the instant Chapter 7 case, Paul acquired a parcel of property located in the lakefront community of Del Lago, approximately 30 miles north- northwest of downtown Houston, Texas."*** (Appendix 1, page 2a). ***"On March 3, 1989, the Debtor moved a mobile home onto the property and began living there with his wife";*** (Appendix 1, page 3a).

The Bankruptcy Court also found that ***"On March 6, 1989, the POA*** (Respondent) ***filed suit".*** (Appendix 1, page 3a). That suit was brought by Respondent only against Paul Nunu and resulted in a consent judgment being entered on July 23, 1990, imposing Respondent's 1988 Covenants upon the property and

permanently enjoining Paul to comply with those restrictive covenants. (Appendix 7, page 50a).

ENFORCEMENT OF STATE JUDGMENT

Through contempt proceedings enforcing the consent judgment of July 23, 1990, (Appendix 7, page 46a) Respondent forced the removal of Petitioners' mobile home as well as the destruction of all improvements Petitioners put upon the Del Lago property. (Appendix 7, page 48a) The Bankruptcy Court recognized in the §362 Memorandum that Petitioners ***"would be living in a mobile home on the property but for the POA's having obtained injunctive relief requiring him to remove the mobile home."*** (Appendix 1, page 5a).

The state court order of contempt dated August 14, 1995 (Appendix 7, page 48a)) enforcing the consent judgment of July 23, 1990, found Paul guilty of contempt for ***"violating the judgment ... by placing a trailer/mobile home upon the property for use as a residential dwelling by Nunu and his spouse, a non-party".*** (Appendix 7, page 48a). The state court's finding in the judgment of contempt was also entitled to full res judicata effect because it is a final judgment and the same parties were litigants.

RES JUDICATA/COLLATERAL ESTOPPEL CONTROLS

Res judicata and collateral estoppel are doctrines that are embodied in the Double Jeopardy clause of the Fifth Amendment. *Ashe v. Swinson*, 397 U.S. 436, 445. (1970). A "final decision" generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. A question remaining to be decided after an order ending litigation on the merits does not prevent finality if its resolution will not alter the order or moot or revise decisions embodied in the order. *Budinich v. Becton Dickerson,* 486 U.S. 196, 199 (1988).

The §362 Motion to Lift Stay proceeding was a contested matter under the Federal R. Bankr. P. 9014, and was a full, adversarial proceeding. The Bankruptcy Court sitting as the trier of fact resolved the factual disputes of the parties after both sides adduced evidence. Federal R. Bankr. P. 9021, required the

Bankruptcy Court to enter a separate judgment in the contested proceeding, which it did. Federal R. Bankr. P. 8002(a) required any party who was dissatisfied with the findings of fact contained in the judgment to file notice of appeal within 10 days. This was not done by any party. Because the §362 Memorandum was not appealed, as a matter of law it became a final judgment, with its findings of fact entitled to full res judicata and collateral estoppel effect between the parties to the proceeding. To hold otherwise licenses unnecessary bankruptcy litigation and frustrates the stated purpose of F.R.C.P. 1, that the Federal Rules are to be administered "*to secure the just, speedy, and inexpensive determination of every claim.*" (Emphasis supplied)

The Court of Appeals and the District Court erred by allowing the Bankruptcy Court in the adversary proceeding to revise its prior findings of fact and conclusions of law. In affirming the District Court, the Court of Appeals held that the finding that Petitioners were ***"living there"*** was ***"preliminary"*** and not binding as res judicata or the law of the case. The Court of Appeals stated that, ***"we agree with the District Court that the Bankruptcy Court was entitled to revise its preliminary findings following an abbreviated hearing on a motion and that the preliminary finding is not binding as the law of the case."*** (Emphasis supplied) (Appendix 2, page 9a) This holding converts a final judgment into an interlocutory order by allowing a collateral attack upon a final judgment of the Bankruptcy Court. This ruling directly conflicts with Fed. R. Bankr. P. 8002(a) as interpreted by numerous published decisions of the Fifth Circuit: *In Re Stangel*, 219 F.3d 498, 500 (5th Cir. 2000), "Fed. R. Bankr. P. 8002(a) allows the Debtor ten days from the date of a Rule 59-type motion in which to file his notice of appeal.", *In Re Macias*, 168 F.3d 209, at 211(5th Cir. 1999), "Failure to timely file notice of appeal deprives the district court of jurisdiction to consider the appeal." See also *In Re Dibert*, 117 F.3d 160 (5th Cir. 1997) (FN 53), *In Re Moody*, 41 F.3d 1024,(5th Cir. 1995), and *In Re Christopher*, 35 F.3d 232 (5th Cir. 1994). All other Circuits agree that bankruptcy orders must be appealed within 10 days or they are final.

By failing to accord the § 362 Memorandum and Judgment as a final order with full res judicata and collateral estoppel effect, the Courts below, on one hand, have treated the §362

Memorandum as a final judgment by allowing Respondent to proceed in state court to have its money judgment entered (Appendix 7, page 56a), while finding in this adversary proceeding that the judgment was not final, for purposes of the relevant findings of fact and conclusions of law. The Respondent should not be able to have it both ways, execute under the judgment in state court but re-litigate the adverse factual findings in Federal Court.

If the §362 Memorandum was a final judgment, entitled to full res judicata and collateral estoppel effect, then Petitioners had no burden to re-prove any finding of fact and conclusion of law contained in a final judgment between the same parties. Petitioners were severely prejudiced by a ruling revising the plain and unambiguous finding of ***"living there"***, because as a matter of federal law they were entitled to rely at trial in the adversary proceeding upon the prior findings contained in the § 362 Memorandum, as well as prior findings contained in the State Court's judgment of contempt dated August 14, 1995 because the same parties were involved. The State Court also found that Petitioners were ***"living there"*** when it found that Paul had placed ***"a trailer/mobile home upon the property for use as a residential dwelling by Nunu and his spouse"*** (Appendix 7, page 48a) (emphasis added). These findings were not applied by the Bankruptcy Court even though copies of these final judgments were introduced as evidence at trial in the adversary proceeding.

The failure of the Courts below to properly apply the law of res judicata merits correction by this Court. "*When an issue of ultimate fact has been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit*". *Ashe v. Swinson*, 397 U.S. 436, 443 (1970). The opinion of the Court of Appeals directly conflicts with the law of res judicata as stated by this Honorable Supreme Court:

> "* * * For res judicata operates only to bar - - repetitious suits involving the same cause of action. [The bar] rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause

> of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' (citation omitted) The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever."

Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 578-579 (1984). In *United States v. Moser*. 266 U.S. 236, 241 (1924) this Court said:

> "The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established....."

In *Myers v. International Trust Co.,* 263 U.S. 64 (1923) this Court decided:

> "An adjudication of bankruptcy, or a discharge therefrom, is a judgment in rem and is binding on, and res judicata as to, all the world, only in respect of the status of the bankrupt, and is not conclusive as to the findings of fact or subsidiary questions of law on which it is based *except as between parties to the proceedings or privies thereto."* [Emphasis supplied]

CONSTRUCTION OF JUDGMENTS

Petitioners acknowledge the principle that if the § 362 Memorandum had been ambiguous, then the Bankruptcy Court would have been entitled to construe that judgment in order to eliminate any ambiguity. However, no Court below has suggested that the §362 Memorandum was ambiguous.

That lack of ambiguity notwithstanding, the Bankruptcy Court revised its original finding that Petitioners were ***"living there"*** to mean ***"living on weekends and fishing trips."*** This violates the established principle of construction of judgments that if the language is plain and unambiguous, there is no room for construction; the effect thereof must be declared in the light of the literal meaning of the language used. The meaning and effect of the decree is to be ascertained, if possible, from its language, and the necessary legal implications therefrom. Here, *"living there"* should be given its plain and ordinary meaning.

The Fifth Circuit has repeatedly held that Texas homestead laws must be liberally construed to protect homestead exemptions. "The purpose of Texas homestead law is, and always has been, the protection of the homestead claimant, not the protection of lenders, judgment creditors or purchasers at foreclosure sales. Furthermore, the Texas courts have always given a liberal construction to the homestead provisions in the Texas Constitution and statutes to protect homestead rights." In Re Niland, 825 F.2d 801, 815 (5th Cir. 1987). "Because homesteads are favorites of the law, we must give must give a liberal construction to the constitutional and statutory provisions that protect homestead exemptions. ... Indeed we must uphold them and enforce Texas homestead laws even though in doing so we might unwittingly "assist a dishonest debtor in wrongfully defeating his creditors". *Bradley v. Pacific Southwest Bank, FSB*, 960 F.2d 502, 507 (5th Cir. 1992).

THE PROPERTY QUALIFIES AS HOMESTEAD

In the §362 proceeding, the Bankruptcy Court fully and fairly litigated the issue of whether Petitioners lived on the Del Lago property for the purposes of determining its status as residential homestead. The Courts below erred by denying Petitioners homestead exemption, which was established as a matter of law by the finding that ***"On March 3, 1989, the Debtor moved a mobile home onto the property and began living there with his wife".*** (Appendix 1, page 3a) (Emphasis supplied). The finding included all elements necessary to establish the homestead exemption as a matter of Texas law. ***"There is no rule of law better established in Texas than that possession and use of real estate by one who owns it, and***

who, with his family, resides upon it, makes it the homestead of the family in law and in fact". *Coury v. Prot*, 85 F.3d 244,254 (5th Cir. 1996). See also *England v. Federal Deposit Insurance Corporation*, 975 F.2d 1168, 1173(fn9) (5th Cir. 1992). *In Re Claflin*, 761 F.2d 1088, (5th Cir. 1985). *In Re Kennard*, 970 F.2d 1455 (5th Cir. 1992).

The finding of "living there" contained in the §362 Memorandum is factually specific and outcome determinative of Petitioners' homestead exemption. This finding unambiguously answers all questions about whether or not the Debtor and his family were living on the property and therefore entitled to the exemption. The fact that Petitioners were involuntarily evicted from the property by the state court and forced to remove their mobile home and improvements, does not change the initial residential homestead character of the property. In the case of *In Re Niland, supra*, at 807, the Fifth Circuit said:

> "It is not seriously disputed that Niland and his wife moved onto the property in 1971 with the intention of using the property as their home, and in fact so used it. We think that this evidence alone was sufficient to enable Niland to meet his burden of establishing the initial homestead character of the property."

Other reasons that the Del Lago property qualifies as Petitioners' exempt residential homestead are: 1) it was designated as exempt homestead on the bankruptcy schedules; 2) valuable improvements were made to the property; 3) Debtor filed a Designation of Homestead in July of 1988 in Montgomery County as required under Texas law (long before any claim of the Respondent accrued); (Appendix 7, page 45a) Petitioners swore under oath of their intent to use the property as their home.

NO VALID LIEN ON PROPERTY

In a Chapter 7 proceeding, under the principles of a "fresh start" a Debtor may avoid the fixing of a lien on exempt property under 11 U.S.C. § 522(f)(1), if: (1) that lien is a judicial lien; (2) that the lien is fixed against an interest of the Debtor in property; and (3) that the lien impairs an exemption to which the Debtor would otherwise be entitled. *In Re: Henderson*, 18F.3d 1305 (5th Cir. 1994). The basic purpose of the Bankruptcy Act is to give the debtor a new opportunity in life and a clear field for

future effort, unhampered by the pressure and discouragement of pre-existing debt. *Lines v. Frederick* 400 U.S. 18 (1970).

The Court of Appeals erred when it allowed Respondents' judicial liens as a valid lien against Petitioners' homestead. The consent judgment of July 23, 1990 and the money judgment for attorneys fees and civil damages dated September 30, 1999, are judicial liens as defined under 11 U.S.C. § 101(36) and are avoidable under 11 U.S.C.§ 522(f)(1) because they clearly impair Petitioner's Homestead. [4] (Appendix 7). The consent judgment of July 23, 1990 has been used to completely destroy Petitioners' residential use of the property . (Appendix 7, page s46a, 48a)

The judgments were entered years after Paul acquired the property on September 10, 1986. The Bankruptcy Court found that ***"On April 13, 1987, the Del Lago Estates Property Owners' Association ("POA") was incorporated. "On March 6, 1989, the POA*** (Respondent) ***filed suit"***.... after the homestead use of the property began on March 3, 1989. (Appendix 1, page 3a). Since the Del Lago property was Petitioners' homestead before the state court judgments were entered, the judicial liens should be avoidable under 11 U.S.C. § 522(f)(1). In *Farrey v. Sanderfoot*, 500 U.S. 291 (1991) this Court decided that a judicial lien can be avoided in a bankruptcy proceeding because it impairs an exemption if the Debtor owned an interest in the property before the lien affixed:

> "[T]he debtor may avoid the fixing of a lien on an interest of the debtor in property...only when the lien attached to the debtor's interest at some point after debtor obtained the property... As before the critical inquiry remains whether the debtor ever possessed the interest to which the lien fixed, before it fixed. If he did... section 522(f)(1) does permit the debtor to avoid the fixing of the lien on that interest.

---

[4] Respondent is not a secured creditor with a pre-existing contractual lien. Rather, Respondent is a judgment creditor with a "consent judgment." A "consent judgment" that imposes an encumbrance against a homestead without the joinder of a spouse, is unenforceable under Texas homestead law. *Behrens v. Behrens*, 186 S.W.2d 697 (Tex. Civ. App. – Austin 1945, no writ); *In Re Daves*, 770 F.2d 1363 (5th Cir. 1985).

CONCLUSION

The Court of Appeals' decision to deny Petitioners' residential homestead exemption thwarts the established principles of res judicata and clear constitutional protection. If uncorrected, the decisions below will arbitrarily convert otherwise final judgments from § 362 proceedings (and state court contempt proceedings) into interlocutory judgments at tremendous expense to both the parties involved and the Federal Judiciary. The result does violence to the concepts of res judicata and collateral estoppel, concepts embodied within the Due Process protections of the Fifth Amendment.

"We have said elsewhere that [t]he considerations that determine finality are not abstractions but have reference to very real interests—not merely those of the immediate parties, but, more particularly, those that pertain to the smooth functioning of our judicial system." *Budinich v. Becton Dickerson* 486 U.S. 196, 201 (1988)

For the foregoing reasons, Petitioners move this Court for reversal of the Court of Appeals' decision denying Petitioners' Del Lago residential homestead exemption, denying res judicata / collateral estoppel effect to the § 362 Memorandum and Judgment, denying avoidance of the Respondent's judicial liens, and for such other and further relief that they may show themselves entitled.

The petition for a writ of certiorari should be granted. Petitioners should be granted general relief.

Respectfully submitted,

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ATTORNEYS FOR PETITIONERS

APPENDIX 1

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE	)	
	)	
PAUL E. NUNU	)	CASE NO. 99-31474-H3-7
Debtor,	)	
	)	

JUDGMENT

Based on the separate Memorandum Opinion signed this same date, it is

ORDERED that the "Motion of Del Lago Estates Property Owners' Association for Relief from Stay" (Docket No. 12) is granted. It is further

ORDERED that the "Debtor's Response to Objection of Del Lago Estates Property Owners' Association to Exemptions of Debtor and Motion to Avoid Judicial Lien under 11 U.S.C. § 522(f) (1)' (Docket No. 16), and "Debtor's Objection to Motion for Relief from Stay and Motion to Disallow Claims" (Docket No. 15) are denied without prejudice to the filing of an adversary proceeding. It is further

ORDERED that the "Objection of Del Lago Estates Property Owners' Association to Exemptions of Debtor" (Docket No. 22) is abated pending further order of this court.

Signed at Houston, Texas on this 8th day of July 1999.

/s/ LETITIA Z .CLARK

UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE	)	
PAUL E. NUNU,	)	CASE NO. 99-31474-H3-7
Debtor,	)	

MEMORANDUM OPINION

The following contested matters are pending: 1) "Motion of Del Lago Estates Property Owners' Association for Relief from Stay" (Docket No. 12) ; 2) "Objection of Del Lago Estates Property Owners' Association to Exemptions of Debtor" (Docket No. 22); "Debtor's Response to Objection of Del Lago Estates Property Owners' Association to Exemptions of Debtor and Motion to Avoid Judicial Lien under 11 U.S.C. 5 522(f) (1)" (Docket No. 16); and 4) "Debtor's Objection to Motion for Relief from Stay and Motion to Disallow Claims" (Docket No. 15) . The following are the Findings of Fact and Conclusions of Law of the court. A separate conforming Judgment will be entered. To the extent any of the Findings of Fact are considered Conclusions of Law, they are adopted as such. To the extent any of the Conclusions of Law are considered Findings of Fact, they are adopted as such.

Background

Paul E. Nunu ("Debtor") filed a voluntary petition under Chapter 7 of the Bankruptcy Code on February 11, 1999. David J. Askanase is the Chapter 7 Trustee.

On September 10, 1986, approximately 13 years prior to the commencement of the instant Chapter 7 case, Debtor acquired a parcel of property located in the lakefront community of Del Lago, approximately 30 miles north-northwest of downtown Houston, Texas. (Exhibit 3)

On October 2, 1982, prior to Debtor's acquisition of the property, the developers of Del Lago recorded restrictions and covenants in the real property records of Montgomery County, Texas. (Exhibit 2)

Debtor is an attorney. He testified that between September 10, 1986, when he acquired the property, as payment from a client involved in the development of Del Lago, and March 3, 1989, he had the property surveyed, had dirt added to the property to raise its level, and had the soil tested.

On April 13, 1987, the Del Lago Estates Property Owners' Association ("POA") was incorporated. (Exhibit 4). On January 12, 1988, the POA recorded amended restrictions and covenants. (Exhibit 5).

On March 3, 1989, Debtor moved a mobile home on to the property, and began living there with his wife. On March 6, 1989, the POA filed suit, in the 284th Judicial District Court of Montgomery County, Texas, seeking to require Debtor to remove the mobile home, on grounds the mobile home violated the 1982 and 1988 deed restrictions. (Exhibit 7) . Debtor asserted in that suit that neither the 1982 nor 1988 deed restrictions applied to his interest in the property. (Exhibit 8)

The state court severed the issue of whether the property was burdened with the deed restrictions, from damages and maintenance and other fees. The state court ruled that Debtor's Property was indeed burdened with the 1988 restrictions. (Exhibit 7) . The state court's judgment was affirmed by the Texas Court of Appeals. (Exhibit 8) . The Texas Supreme Court denied Debtor's application for writ of error. (Exhibit 9)

On October 17, 1995, after the denial of Debtor's application for writ of error by the Texas Supreme Court, the POA sought and obtained an order holding Debtor in contempt, and directing that Debtor be jailed until he purged the contempt by removing the mobile home and other personalty from the property. (Exhibit 13) . A second such order was entered on October 30, 1995. (Exhibit 14)

During 1998, the POA again sought a contempt order to

enforce the judgment it obtained. Debtor was jailed, and was subsequently released on personal recognizance on the condition that he immediately comply with the court's orders to remove all unapproved architectural improvements. Debtor complied with the order, and the contempt was purged, by order entered February 11, 1998. (Exhibit 16)

In the remainder of the state court action severed from resolution of the deed restriction issue, the POA sought damages, unpaid assessments, and attorney's fees and costs. Following a jury trial held during February, 1999, the jury found $13,850 in assessments, $78,000 in civil damages, and $276,102.59 in attorney's fees to the POA. No judgment was entered on the jury verdict because Debtor filed the instant bankruptcy case, thus imposing the automatic stay against further proceedings.

The parties stipulate that The value of the property is $100,900. (Exhibit 1)

The Instant Motions

In the instant motion for relief from stay, the POA seeks relief from stay in order to seek entry of judgment in the state court, and thereafter to seek foreclosure of Debtor's interest in the property.

In response, based on Debtor's assertion that the property is exempt, Debtor seeks avoidance of the lien asserted by the POA. Debtor also seeks disallowance of the POA's claim for attorney fees on grounds he is not responsible for the attorney fees because the POA was incorporated after he acquired the property.

The POA objects to Debtor's claim of exemptions in the property, on grounds Debtor maintains a separate homestead within the city of Houston, Texas.

Debtor contends that his "homestead" consists of a house located within the city of Houston, Texas, in which he and his family use space both for residence and office purposes, and a residential homestead located at the Del Lago property. He contends the POA is estopped from asserting that the property is

not his residence because Debtor would be living in a mobile home on the property but for the POA's having obtained injunctive relief requiring him to remove the mobile home.

Relief from Stay

Section 362(d) of the Bankruptcy Code provides in pertinent part:

> On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying or conditioning such stay--
>
> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest;
>
> (2) with respect to a stay of an act against property under subsection (a) of this section, if- -
>
> > (A) the debtor does not have an equity in such property; and
> >
> > (B) such property is not necessary to an effective reorganization.

11 U.S.C. §362(d).

In a hearing on a motion for relief from the stay, the party seeking relief has the burden of proof on the issue of debtor's equity in the property. The party opposing relief has the burden of proof on all other issues. 11 U.S.C. § 362(g).

What constitutes "cause" for the lifting of the stay pursuant to Section 362(d) (1) is not defined in the Bankruptcy Code and whether cause exists must be determined on a case by case basis. Allowing a matter to proceed in another forum may constitute cause for the lifting of the stay. In re Murray Industries, Inc., 121 B.R. 635 (Bankr. M.D. Fla. 1990).

In determining whether to lift the automatic stay to allow

litigation against a debtor to proceed outside this court, the court should determine: (1) whether lifting the stay will result in any great prejudice to the debtor or the bankruptcy estate; (2) whether any hardship to a nondebtor of continuation of the stay outweighs any hardship to debtor in lifting the stay; and (3) whether the creditor has a probability of prevailing on the merits of the case. In re Namazi, 106 B.R. 93 (Bankr. E.D. Va. 1989)

In the instant case, there is no reorganization contemplated, since this case is a Chapter 7 case. The issue of whether Debtor has equity in the property turns on the status of the various components of the POA's judgment against Debtor. The parties have stipulated as to the value of the property. However, the amount of the debt owing and whether such debt is secured by the property is hotly disputed.

The existence of this hotly contested issue, in a court of competent jurisdiction which has held numerous hearings in the matter over the course of ten years, itself constitutes cause for the lifting of the stay to permit the state court to enter its judgment, and to permit the pursuit of any appeals which the parties may wish to pursue. There is no persuasive showing of hardship to Debtor or to the POA in litigating to finality the proceeding pending in the state court. Considerations of comity and judicial economy weigh in favor of lifting the stay to permit the 284th Judicial District Court of Montgomery County, Texas to take the Cause No. 90-10-03568-CV to conclusion. The court concludes that the stay should be lifted for cause.

Allowance of Claim and Lien Avoidance

A proceeding to disallow a claim and to seek the avoidance of a lien requires the filing of an adversary proceeding. BR 3007. In the instant case, no adversary proceeding has been commenced. Moreover, the issues involved with respect to allowance of the claim and lien avoidance should await the resolution of the state court proceeding. The court concludes that the Motion to Disallow Claim and the Motion to Avoid Lien should be denied without prejudice to the filing of an adversary proceeding.

Exemptions

A party objecting to exemptions has the burden of proving that the exemptions are not properly claimed. Bankruptcy Rule 4003 (c)

The parties did not, in the evidence presented on the instant motions, address the issue raised in Debtor's brief (Docket No. 24) that Del Lago and Houston are part of one urban community, and that this enables him to claim a homestead consisting of a residence in Del Lago and a business location in the city of Houston. Since the issue is complex, and relates, *inter alia*, to the matters to be resolved by the state courts, the court concludes that the Objection to Exemptions should be abated pending further order of this court.

Based on the foregoing, a separate conforming Judgment will be entered.

Signed at Houston, Texas on this 8th day of July, 199º

/s/ LETITIA Z. CLARK

UNITED STATES BANKRUPTCY JUDGE

APPENDIX 2

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

US Court of Appeals

FILED
April 23, 2001

No. 00-20897

Summary Calendar

IN RE: PAUL E. NUNU,
Debtor,
PAUL E. NUNU; SHANDA NUNU,
Appellants,

VERSUS

DEL LAGO ESTATES PROPERTY OWNERS ASSOCIATION,
Appellee.

Appeal from the United States District Court for the Southern District of Texas

Before DAVIS, JONES and DeMOSS, Circuit Judges.

PER CURIAM:[1]

Paul E. Nunu and his wife Shanda Nunu appeal from a final judgment in an adversary proceeding incident to Nunu's Chapter 7 bankruptcy. They challenge the denial by both the District and Bankruptcy Courts of their residential urban homestead exemption as applied to property Nunu owns located in Del Lago Estates subdivision in Conroe, Texas. Nunu owns other property in Houston, Texas that is the site of a residence and Paul Nunu's business office. Nunu argues that he is entitled to a homestead exemption covering both properties which would entitle him to discharge the lien claimed on the Del Lago property by the creditor, Del Lago Estates Property Owner's Association.

Nunu argues first that the District Court erred by failing to give res judicata or collateral estoppel effect to certain statements in the state court judgment that is the basis of the Creditor's lien and in a Memorandum Opinion of the Bankruptcy Court. The validity of the homestead exemption was not an issue in the state court proceedings. Accordingly, it can have no res judicata or collateral estoppel effect in these proceedings. In addition, we agree with the District Court that the Bankruptcy Court was entitled to revise its preliminary findings following an abbreviated hearing on a motion and that the preliminary finding is not binding as the law of the case. U.S. v. O'Keefe, 1G9 F.3d 281, 283 (5th Cir. 1999) ; Meineke Discount Muffler v. Javnes, 999 F.2d 120, 122 (5th Cir. 120, 122 (5th Cir. 1993)

We also agree with the District Court's and Bankruptcy Court's determination that the Del Lago property was not "in the same urban area" as the Houston office/residence and. was not "used for the purposes of an urban home" which would qualify the Del Lago property for the Texas homestead exemption. Tex. Prop. Code §41.002(a). Whether a property constitutes a homestead is a question of fact which we review under the clearly erroneous standard. Gregorv V. Sunbelt Savings, F.S.B., 835 S.W.2d 155, 158 (Tex. App. - Dallas, 1992, writ denied). The

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[1]Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

factual bases for the courts' judgments are clearly set out in their opinions and supported by the record.

Nunu also challenges the validity of the creditor's lien on the Del Lago property. This challenge seeks to relitigate issues that were presented and decided in the state court litigation, which resulted in a consent judgment that Nunu's Del Lago lot was subject to the 1988 Restrictions on Del Lago subdivision lots and awarding damages. Those issues may not be relitigated here. We agree that the award for past assessments and attorney fees is secured by a lien on the Del Lago lot. Inwood North Homeowners Association, Inc. v. Harris, 736 S.W. 2d 632 (Tex. 1987) . Finally, since the Del Lago lot is not exempt from the bankruptcy estate as urban homestead property, Shanda Nunu has no right under Texas law to consent to or challenge any encumbrance.

Accordingly, we AFFIRM for essentially the reasons stated by the District Court in its Memorandum and Order dated August 31, 2000 and by the Bankruptcy Court in its Memorandum Opinion dated March 31, 2000.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

US Court of Appeals
FILED
May 21, 2001

No. 00-20897

In The Matter Of: PAUL E NUNU
Debtor

PAUL E NUNU; SHANDA NUNU
Appellants

V.

DEL LAGO ESTATES PROPERTY OWNERS ASSOCIATION
Appellee

Appeal from the United States District Court for the Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC

(Opinion 4/23/01, 5 Cir., _____, _____F.3d_____)

Before DAVIS, JONES and DeMOSS, Circuit Judges

(×) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel, Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the petition for Rehearing En Banc is DENIED.

Entered For The Court:

/s/ W. Eugene Davis

United States Circuit Judge